Supreme Court, U.S.
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No. 06-823

IN THE
Supreme Court of the United States

MOSHE TAL; BRICKTOWN 2000, INC.;and TAL TECHNOLOGIES, INC.,

Petitioners,

v.

DAN RANDOLPH HOGAN; TMK/HOGAN JOINT VENTURE, a.k.a. COMMERCIAL REAL ESTATE SERVICES JOINT VENTURE; HOGAN PROPERTY MANAGEMENT, L.L.C.; BRICKTOWN-TMK/ HOGAN PARKING, L.L.C.; BRICKTOWN-TMK/HOGAN ENTERTAINMENT, L.L.C.; MARK D. ELGIN; STONEGATE MANAGEMENT COMPANY, L.L.C.; ELGIN DEVELOPMENT COMPANY, L.L.C.; TDC COMPANY, L.L.C.; and, TIANA P. DOUGLAS

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TENTH CIRCUIT COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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Dated: December 11, 2006.

QUESTIONS PRESENTED

1) Whether, for purposes of a motion to dismiss under Fed.R.Civ.P. 12(b)(6), the Tenth Circuit erred when it applied the heightened pleading standards of Fed.R.Civ.P. 9, rather than the notice pleading standards of Fed.R.Civ.P. 8, to evaluate the sufficiency of all elements of Tal Tech's and BT 2000's *Racketeering Influenced Corrupt Organizations Act* ("RICO") claims, including the allegations of bribery necessary to establish the required elements of control and participation under 18 U.S.C. § 1262(b)©, as set forth in their Complaint?

2) Whether, for purposes of a motion to dismiss under Fed.R.Civ.P. 12(b)(6), the Tenth Circuit erred when it applied the heightened pleading standards of Fed.R.Civ.P. 9, rather than the notice pleading standards of Fed.R.Civ.P. 8, to evaluate the sufficiency of Tal Tech's and BT 2000's allegations of bribery in regard to their antitrust claim(s) under the Clayton Act, as set forth in their Complaint

3) Whether the Tenth Circuit erred when held that the *Rooker-Feldman* doctrine barred Tal Tech and BT 2000 from asserting fraudulent condemnation claims: I) because they were in privity with parties to prior litigation related to the condemnation issued; and ii) because there is parallel state court proceedings involving the condemnation?

4) Whether the Tenth Circuit erred when it held that *res judicata* barred Moshe Tal's personal claims based on his position as a *qui tam* relator in prior litigation?

5) Whether the Tenth Circuit erred when it held that *res judicata* barred Moshe Tal's claims even though there has been a significant change in facts and law that alters the underlying predicates for Moshe Tal's claims.

PARTIES TO THE PROCEEDING

The following individuals and entities are parties to the proceedings in the courts below:

Petitioners: (1) **Moshe Tal**, an Oklahoma resident ("Tal"); (2) **Bricktown 2000, Inc.**, an Oklahoma Corporation ("BT-2000"); and, (3) **Tal Technologies Inc.**, an Oklahoma Corporation ("Tal-Tech") (collectively referred to as the "Tals" or "Tal's Group").

Respondents: (1) **Dan Randolph Hogan**, an Oklahoma resident ("Hogan"); (2) **TMK/Hogan Joint Venture**, a.k.a. **Commercial Real estate Services Joint Venture**, an Oklahoma Joint-Venture ("TMK/Hogan"); (3) **Hogan Property Management, L.L.C.**, an Oklahoma Limited Liability Company; ("Hogan Property"); (4) **Bricktown-TMK/Hogan Parking, L.L.C.**, an Oklahoma Limited Liability Company (Hogan Parking");(5) Bricktown-TMK/Hogan Entertainment, L.L.C., an Oklahoma Limited Liability Company ("Hogan Entertainment"); (6) **Mark D. Elgin**, a n Alabama resident ("Elgin"); (7) **Stonegate Management Company, L.L.C.**, an Alabama Limited Liability Company, and has been doing business in Oklahoma ("Stonegate"); (8) **Elgin Development Company, L.L.C.** an Alabama Limited Liability Company, and has been doing business in Oklahoma ("Elgin Development"); (9) TDC Company, L.L.C., an Alabama Limited Liability Company, and has been doing business in Oklahoma ("TDC") (Respondents 1-9 collectively referred to as the "Hogans"; the "Hogans Team"; or, "Hogan's Group"); and, (10) Tiana P. Douglas, an Oklahoma resident ("Douglas").

Amicus Curie: **The City of Oklahoma City** ("City"), an Oklahoma Municipal Corporation; and, **The Oklahoma City Urban Renewal Authority** ("Urban Renewal"), an Oklahoma Public Body Corporate Entity.

Corporate Disclosure Statement

The corporate Petitioners, Tal Technologies Inc. ("Tal Tech" or "TTI"), and Bricktown 2000, Inc. ("BT-2000") is each an independent Oklahoma corporation with no parent company. However, the majority of TTI's stock is held by Tal-Solomon Family Trust ("TS Trust"), for which Petitioner Moshe Tal ("Tal") is a Trustee and manager of said TS Trust. Furthermore, Petitioner Tal is also a holder of a valid assignments from each corporations to it's claims, and a Promissory notes and Quite Claim Deed to the Corporate's (TTI's) property and assets.

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OPINION AND ORDERS BELOW

1. Published Opinion, United States Court of Appeals for the Tenth Circuit's *Tal et al., v. Hogan, et al.*, 453 F.3d 1244 (10th Cir. 2006) - Dated 6/29/06 [Appendix 1-45];

2. Order - Tenth Circuit Court of Appeals, *Tal et al., v. Hogan, et al.*, Appeal No. 03-6293 - Denying Appellants' Petition For Rehearing - Dated 9/11/06 [Appendix, 46];

3. Order - U.S. District Court for the Western District of Oklahoma, *Tal, et al., v. Hogan, et al.*, CIV-02-324F, dismissing all of the Petitioners' claims - filed 9/30/03 [appendix 47-75]

4. Judgment - U.S. District Court for the Western District of Oklahoma, *Tal, et al., v. Hogan, et al.*, CIV-02-324F, dismissing all of Tals' claims - filed 9/30/03 [Appendix 76-77];

5. Order- U.S. District Court for the Western District of Oklahoma, *Tal, et al., v. Hogan, et al.*, CIV-02-324F, dismissing all of Moshe Tal's personal claims, and other rulings - filed 10/31/02 [Appendix 78-80].

JURISDICTION

The Decision of the Tenth Circuit was entered on June 26, 2006. Published Opinion, 453 F.3d 1244 (10th Cir. 2006) [Appendix,. 1-45]. On July 17, 2006, the Tals filed with the Tenth Circuit a Petition for Rehearing [Appendix, 201-247], and on September 11, 2006, the Tenth Circuit denied the Tals' Petition for Rehearing [Appendix, 46]. The judgment below is therefore final for purposes of this Court's jurisdiction. Jurisdiction is proper under 28 U.S.C. § 1651; and the additional jurisdictions of the District Court (the court of first instance) to wit: 18 U.S.C. §1964(c) ; 15 U.S.C. §15(a) and 28 U.S.C. §1331. Defendants' predicate acts, for purposes of 18 U.S.C. §1961, arose under 18 U.S.C.§1341; 18 U.S.C. §1343; 18 U.S.C. §201; and, 21 Okl. Stat. §381.

RULES/ STATUTES/CONSTITUTION INVOLVED

Fed.R.Civ.P. 12(b)(6);

Fed.R.Civ.P. 8;

Fed.R.Civ.P. 8;

18 U.S.C. §1961, *et seq.*;

15 U.S.C. §15, *et seq.*;

18 U.S.C.§1341;

18 U.S.C. §1343;

18 U.S.C. §201;

21 Okl. Stat. §381;

Okla. Const. Article 10, §§ 23-24.

STATEMENT OF THE CASE

Petitioners, the Tals, initiated this action to recover damages suffered as a result of the Hogan Group's and Douglas' participation in a fraudulent scheme to deprive the Tals of their business-development rights in access of $200,000,000. Douglas was a local public official holding the position of Executive Director of the Oklahoma City Urban Renewal Authority. Douglas abused her political/official position/power in order to manipulate and corrupt Oklahoma City Council members and the Urban Renewal. The Hogans were developers who conspired with Douglas and others, to use illegal means to obtain contracts with the City and Urban Renewal. The City and Urban Renewal were named as the "Enterprise" for purposes of Tals' RICO claims.

The Tals' alleged that the Hogan Group and Douglas, in concert with unnamed coconspirators, conspired together to carry out a fraudulent scheme, including bribing City and Urban Renewal officials, and City's Mayor and Councilperson, to gain votes, and making material false misrepresentations, to (I) rig the Oklahoma City public bidding process so as to illegally obtain valuable development rights in a Metropolitan Area Projects ("MAPS") and in so doing, further to (ii) prevent Petitioners, despite the manifestly superior qualifications of theirs and their joint venture partner, The Cordish Company, from being chosen as the City's developer for said project; and to (iii) acquire legal title to Tal Tech's development properties by unlawful means.

Based on this conduct, the Tals asserted six causes of actions: four (4) causes of action under the RICO Act, 18 U.S.C. § 1961, *et seq.*, including RICO Conspiracy arising out of the Hogan Groups' and Douglas' obtaining a condemnation judgment of Tal Tech's Downtown/Bricktown property by fraud; one (1) cause of action under the Sherman Act (15 U.S.C. § 1, *et seq.*); and one (1) cause of action under state law's Tortious Interference with Business.

As a basis for their RICO and antitrust claims the Tals alleged that the Hogan Group and Douglas employed numerous fraudulent means, including mail and wire fraud, to further their scheme to conspire with both public officials and private accomplices, to condemn valuable

properties belonging to Tal Tech TTI (1.4 prime acres along the Downtown/Bricktown MAPS Canal), and thereafter transfer said properties and other publicly acquired properties to the Hogan Group for their private use/control and profits. They also employed bribery of public officials as a means of control and participation with the enterprises, as well as a means of illegally, in violation of the antitrust laws, gaining an advantage over the competition, the Tals.

As predicate acts for RICO, the numerous allegations of mail fraud consisted, in part, of a letter from Hogan to the Urban Renewal which fraudulently representing that Defendant TMK/Hogan was backed by the $11 Billion Torchmark Corporation ("Torchmark Misrepresentation"). Another allegation of mail fraud involved a letter from Mr. Tolbert to the City and Urban Renewal which supported the Hogans' earlier fraudulent representation that the Bricktown Association was a partner with TMK/Hogan. The Tenth Circuit found that both of these allegations of mail fraud were sufficient to serve as predicate acts for RICO. Opinion, at 1265-1266. There were also multiple allegations of wire fraud in the Complaint. These included three electronic transmissions which the Tenth Circuit found to be sufficiently pled to satisfy the predicate act requirements of RICO. Opinion, at 1266.

The Tals also specifically alleged that Respondent Douglas submitted to the City Council and MAPS Oversight Board a resolution in support of Urban Renewal's proposed agreement with the Hogans, whereby under said agreement the City would: (I) transferred to the Hogan Group ownership of the entire 51 acres, for which the City had paid approximately $4 Million to $5 Million, plus approximately $1 Million in Federal Community Development Block Grant ("CDBG") funds, in exchange for the Hogans' promise to make less than $4 Million in improvements; and, (ii) further provided the Hogans $4 million of Section 108 (forgivable loans) in Federal CDBG funds. *Second Amended Complaint*, ¶84 [Appendix, pp.102-183]; and, RICO Statement, ¶¶ 7 and 9 (Urban Renewal funded with Federal funds and managing Federal projects, including revitalization of the bombed Oklahoma City's Murrah Federal Building area) [Appendix, pp.184-200].

To support their allegations of control over the enterprise and participation in the operation of the enterprise under 18 U.S.C. § 1962(b) and § 1962©, the Tals specifically alleged that the Hogan Group and Douglas used bribery as their main form of control and as a means of participation in the enterprises. Specifically, the Tals' pled specific facts showing bribery including: Hogans' bribing Councilman Guy Liebmann ("Liebmann") for his swing vote (5/4) and obtaining the City Council's approval (for granting the Hogan Team's the redevelopment contracts) by unlawful means (including appointing Liebmann to certain additional positions) [Second Amended Complaint {"Complaint"}, ¶¶ 157-158, and ¶ 179 (ii) and (iii)], Complaint, [Appendix, pp.102-183; and RICO Case Statement, ¶ 6, Appendix, pp. 184-200]; Hogans bribing Urban Renewal Commissioner Fred Hall ("Hall") by making Hall and his entities 50% partners in the Hogans' East Wharf Development [Complaint, ¶¶ 38 and 179(I), Appendix, pp. 102-183], and making Hall and his entities 1/3 partner in Hogan's Parking Redevelopment project [Complaint, ¶¶ 71 and 179(v), Appendix, pp. 102-183]; Hogans bribing Bricktown Association President, Jim Tolbert ("Tolbert") by making Tolbert and his entities 1/3 partner in Hogan's Parking Redevelopment project [Complaint, ¶ 179(vi), Appendix, pp. 102-183], and subsequently, appointing Tolbert as Urban Renewal Commissioner; Hogans bribing Urban Renewal Commissioner J. Larry Nichols ("Nichols") by managing Nichols' Mid America Tower Building below market price, and making substantial public improvements surrounding Nichols' Building [Complaint, ¶ 179(ix) and (x), Appendix, pp. 102-183]; and the Hogans' bribing City's Mayor, Kirk Humphreys ("Humphreys"), by making substantial public improvement surrounding Humphreys' Power Alley Parking Building and also closing street/alley and transferring deed to said street/alley to Humphreys' Power Alley Parking company (at no cost)[Complaint, ¶ 179(viii), Appendix, pp. 102-183]; Hogans bribing Urban Renewal, its Commissioners and Management, by leasing to Urban Renewal office space below market rate/value [Complaint, ¶ 179(viii), Appendix, pp. 102-183]. Tal Tech and BT 2000 claimed said briberies are in violation of State Laws [21 O.S. § 381, *et seq.*] as well as Federal Bribery law [18 U.S.C. §201]. *Plaintiff's* 3/12/03 *Combined Response To All Defendants' Motions To Dismiss, and Brief in Support* [Appendix, pp. 315-352].

On October 30, 2002, the District Court, dismissed, without leave to amend, all of Tal's personal claims on a number of grounds, but primarily, finding that Tal was barred by *res judicata* and lacked standing to sue because he was the leader of a taxpayers group called *Taxpayers Against Ripoffs* ("TAR") who previously filed taxpayers *Qui Tam* suits against the Respondents/Defendants (i.e., *res judicata*, etc.). [10/30/02 Hearing Transcript, Appendix, pp.81-101, at 96, *also see*, 10/31/02 Order, Appendix, pp. 78-80]. At the hearing where he dismissed the claims Judge Friot stated that issue and claim preclusion barred Moshe Tal's claims because he could and should have asserted his personal claims in the *qui tam* litigation. While Judge Friot concluded that claim preclusion and issue preclusion were fatal to all of the claims asserted in this case by Moshe Tal, he was "not able to conclude that with respect to the claims asserted by Bricktown 2000 and Tal Technologies, Inc." 10/30/02 Hearing Transcript, Appendix, at pp. 97-98

On appeal, Tal protested the dismissal based on *res judicata* because there had been a significant change in relevant and controlling facts and law. *See* 7/13/06 Petition for Rehearing, Appendix, pp. 245-247; Appellant Tal's Opening Brief [not included in Appendix].[1] He also claimed that res judicata could not be applied to him in regards to prior *qui tam* suits, because as the *qui tam* relator he was not a party and could not assert his own claims in the litigation. *See* 7/13/06 Petition for Rehearing, Appendix, pp. 245-247; Appellant Tal's Opening Brief [not included in Appendix].

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[1]The facts changed significantly when the Urban Renewal transferred the property to a private person for private development. This supported Tal's allegation that the property had been condemned for private use and not public use as alleged by the City and Urban Renewal. Tal had also claimed that taking of private property for private use was barred by the Oklahoma Constitution. Since the condemnation, the Oklahoma Supreme *The Board of Commissioners of Muskogee County v. Lowery*, 2006 OK 31, 136 P.3d 639, that the Oklahoma Constitution prohibits the condemnation of private property for private use. The Oklahoma Supreme Court also held in *Midwest City v. House of Realty, Inc., et al.*, 2004 OK 56, 100 P.3d 678 and related case - *House of Realty, Inc., v. City of Midwest City*,2004 OK 97, 109 P.3d 314, that a government entity may not condemn private property for one purpose and then transfer it to another governmental entity for another purpose.

After filing a lengthy and detailed *Second Amended Complaint* [Appendix, pp. 102-183] and a *RICO Statement* [Appendix, pp. 184-200], on September 30, 2003, the District Court issued an Order [Appendix, pp. 47-75], and Judgment [Appendix, pp. 81-82] dismissing the entire case with prejudice on several grounds - except the Tal Tech's and BT 2000's State claims for Tortious Interference With Business (dismissed without prejudice). The District Court also decided to treat the claims for RICO Conspiracy to Obtain Condemnation By Fraud as a "State Claim" and dismissed said claim without prejudice.[2]

On June 26, 2006, the Tenth Circuit Court of Appeals issued it's Opinion affirming the District Court's dismissal of the Tals' Complaint. Published Opinion, 453 F.3d 1244 (10th Cir. 2006) [Appendix, pp. 1-45]. On July 13, 2006, the Tals filed with the Tenth Circuit a Petition for Rehearing [Appendix, pp. 201-247], and on September 11, 2006, the Tenth Circuit denied the Tals' Petition for Rehearing [Appendix, p. 46].

The Tenth Circuit found that Tal Tech's and BT2000's Complaint adequately pled its allegations of wire fraud and mail fraud pursuant to the stringent pleading requirements for fraud found in Fed.R.Civ.P. 9(b). The Tenth Circuit also found that Tal Tech and BT 2000 sufficiently alleged a pattern of racketeering activity.

Despite the finding that Tal Tech and BT 2000 had adequately plead the elements of mail and wire fraud, the Tenth Circuit affirmed the District Court's dismissal of the RICO claims under Fed.R.Civ.P.

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[2] Note: While the Appeal was pending before the Tenth Circuit, within one (1) year from the time the state claims were dismissed without prejudice, and pursuant to the Oklahoma Saving Clause (12 O.S. 100, *et seq.*), specifically on September 27, 2004, the Tals re-filed the Tortious Interference and the Conspiracy to Obtain Condemnation Judgment by Fraud claims with the Oklahoma County State Court (*Tal, et al., v. Hogan, et al.*, CJ-04-7943). The case is still pending, however, the Hogan Group, the City and Urban Renewal moved to dismiss, among other things, claiming *Res Judicata*, statute of limitations, etc. Initially the trial judge granted said motions, however, on November 27, 2006, the Oklahoma Supreme Court granted Tal's Writ of Mandamus/Prohibition (for disqualification of the trail judge- the Honorable Vicki Robertson), and Ordered her to vacate all adverse rulings (including the dismissal orders/judgments).

12(b)(6). Using the heightened pleading standards of Fed.R.Civ.P. 9, the court held that because Tal Tech and BT2000 had failed to cite the relevant bribery statute and failed to sufficiently plead the facts necessary to support their allegation of bribery, they were unable to support the RICO requirements under 1962(b) and ©.[3]

The Tenth Circuit held that if Tal Tech and BT 2000 had adequately pled bribery, it would have been sufficient to support the required elements of control and participation as required by 1962(b) and ©. The Court also held that because Tal Tech and BT 2000 failed to satisfy the requirements of 1962(b) and 1962© by failing to adequately plead bribery, they perforce failed to satisfy the

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[3] The 10th Circuit found that Tal had plead bribery under the Federal Bribery statute at 18 U.S.C. § 201, but had failed to show that their claims came within the ambit of § 201 because they had not shown the existence of federal ties between Douglas, Urban Renewal Commissioners or the City Council. Based on this erroneous finding, the court found that any claim of bribery could not stand. This finding is contrary to the Record. At ¶ 137 of the Second Amended Complaint, the Tals specifically alleged: "On May 26, 1998 Defendant Douglas submitted to the City Council and MAPS Oversight Board a resolution in support of Urban Renewal's proposed agreement with Defendant TMK/Hogan. Under the said agreement the City (I) transferred to Defendant TMK/Hogan ownership of the entire 51 acres, for which the City had paid approximately $4 million to $5 million, **plus approximately $1 million in Federal community development block grant funds**, in exchange for Defendant's promise to make less than $4 million in improvements; (ii) and **further provided Defendant $4 million of loans in community development block grants**. (Emphasis added). In the RICO Case Statement, ¶ 7, the Tals stated that the Urban Renewal (Enterprise) was managing renovation and construction of the new (bombed) Federal Murrah Building, and likewise, in ¶ 9 of the RICO Statement, the Tals stated ... "**Urban Renewal. has received approximately $1.5 million in Community Development Block Grants, a federal program** ...". Clearly the finding that the federal bribery statute did not apply because there were no federal ties, was erroneous. Then in regard to the Oklahoma state bribery statute, the court found that the Tals had not cited the statute in the Complaint and therefore, had not sufficiently alleged bribery under Oklahoma law. While the statute, 21 Okla. Stat. § 38, was cited in the original Complaint, it is true that the citation was omitted in the amended Complaint. However, since there is no pleading requirement that a complaint cite to a statute, the failure to include the citation to the Oklahoma bribery statute is not grounds for dismissal under 12(b)(6).

requirements of 1962(d).[4]

The Tenth Circuit also dismissed the antitrust claims, in part, because they found the allegations of bribery to be inadequate. They found that because there was no finding of illegal conduct, including bribery, by Douglas or the Hogans, they were immune from prosecution based on the *Parker* and *Noerr-Pennington* doctrines. The court also dismissed the antitrust claims finding that lacking sufficient allegations of bribery, there was no evidence of illegal conduct.[5]

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[4] It is difficult to understand how the Tenth Circuit could have found that the facts pled to support the bribery claims were insufficient based upon the court's express acknowledgment of allegations, which, if true, are a violation of Oklahoma bribery and conflict of interest statutes. The court noted the acts stating: "[included in these acts are: (1) the renting of office space to the Renewal Authority at below-market rates; (2) bribing Renewal Authority Commissioner Hall by making him a 50% partner in an East Wharf development project; (3) bribing Renewal Authority Commissioner Nichols by offering the Mid-American Tower at below-market rates; (4) securing Commissioner Talbot a position on the Myriad Garden Trust and the Renewal Authority; (5) bribing Councilman Liebmann by contributing to a political fundraiser which led to his appointment to political positions with various City trusts; and (6) bribing Mayor Humphreys. Opinion, 453 F.3d at 1267. Even though this conduct clearly establishes bribery, the court found this conduct to be nothing more than lobbying. Whether such prohibited conduct amounts to bribery or just lobbying is a question of fact which cannot be determined in a 12(b)(6) motion to dismiss.

[5] The Tenth Circuit's claim there was no bid-rigging because the alleged conduct did not fit the traditional definition of "bid-rigging" makes an immaterial distinction. Regardless of vernacular used to describe the conduct, the fact remains that there are sufficient specific allegations to adequately plead violations of Oklahoma fair bidding law, the bribery statutes which would lead the result that the bids were unlawful or "rigged." The Complaint set forth specific facts which showed, that in contravention of Oklahoma law, that despite the appearance of a fair and legal bidding process, the Request for Proposals was a sham because the Hogans had been pre-selected to get the contracts before the bid-submission's deadline. See ¶ 190 of the Second Amended Complaint. Moreover, since it is undisputed that at least 2 out of the 5 Urban Renewal commissioners had personal and financial interests in the outcome of the bid's award and, as alleged, conspired with the Hogan in developing the scheme to award the contracts to the Hogans - **before** the deadline – regardless of the bids of other developers – these facts, if true, are sufficient to raise questions of fact for purposes of unfair trade and monopoly claims. So whether it is called bid-rigging or something else, it is clearly illegal and such claims should not have been dismissed under Fed.R.Civ.P. 12(b)(6).

The finding that Tal Tech and BT 2000 failed to adequately plead bribery, as far as it applies to demonstrating how the Hogans and Douglas controlled or participated in the RICO enterprises, or for purposes of antitrust, is contrary to the notice pleading requirements in Fed.R.Civ.P. Rule 8. There is no requirement under Rule 8 that the Complaint contain a citation to the statute upon which the allegations rely. Moreover, taking the facts enumerated above and in the Complaint as true, Tal Tech and BT 2000 gave Douglas and the Hogans sufficient notice of the bribery claims against them and to establish the wrongful acts of bribery of city officials which led to control over the Enterprise and collusion for purposes of antitrust. Thus, for purposes of Fed.R.Civ.P. 8 and 12(b)(6), Tal Tech's and BT 2000's claims under § 1962(b), § 1962© and § 1962(d) and antitrust were sufficiently plead and should not have been dismissed for failure to state a claim.

The Tenth Circuit also dismissed Tal Tech's and BT 2000's claims related to fraudulent condemnation, holding that they were barred by the *Rooker-Feldman* Doctrine. The court held that under *Rooker-Feldman*, based on privity and a parallel state court proceeding, Tal Tech and BT 2000 are barred from asserting claims related to the fraudulent condemnation. This holding is in direct conflict with this Court's recent decisions in *Lance v. Dennis*, 126 S.Ct. 1198 (2006) and *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280 (2005). In these cases, this Court held that *Rooker-Feldman* had a very narrow application and did not bar federal suits based on concepts of privity or the existence of a parallel state court proceeding. It also conflicts with the Tenth Circuit's own decision in *Mo's Express v. Sopkin*, 441 F.3d 1229, 1234 (10th Cir. 2006).

REASONS FOR GRANTING CERTIORARI

SUMMARY

1) CERTIORARI SHOULD BE GRANTED BECAUSE THE TENTH CIRCUIT HAS DECIDED A MATTER IN DIRECT CONFLICT WITH THE DECISIONS OF THIS COURT AND OTHER FEDERAL COURTS. THIS ISSUE IS ALSO, IN PART, A QUESTION OF FIRST IMPRESSION INVOLVING AN IMPORTANT ISSUE OF FEDERAL LAW.

HEIGHTENED PLEADING STANDARDS FOR ALL ELEMENTS OF RICO COMPLAINTS.

In affirming the Rule 12(b)(6) dismissal of Tal Tech's and BT 2000's RICO claims, the Tenth Circuit, relying on Tenth Circuit precedent, applied the heightened pleading standard under Fed.R.Civ.P. 9 to all elements of the RICO claim. This is in direct conflict to the decisions of this Court holding that a federal court may not apply a "heightened pleading standard" one that is more stringent than the notice pleading requirements of Rule 8(a), in cases not involving fraud or mistake. *See Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506 (2002); *Leatherman v. Tarrant County*, 507 U.S. 163 (1993). The use of this heightened pleading standard is also in conflict with other federal courts where it is held that, with the exception of the predicate acts involving fraud, RICO complaints are subject to the pleading requirements of Fed.R.Civ.P. 8.

While this Court has held that heightened pleading requirements may not be applied to issues other than fraud or mistake, the decided cases did not involve RICO claims. Thus, to the extent that the issues here involve RICO, the question of heightened pleading requirements as to all elements of RICO is a question of first impression.

HEIGHTENED PLEADING STANDARDS FOR ANTITRUST COMPLAINTS.

The Tenth Circuit's heightened standard of pleading to the RICO issues, also brought about the dismissal of Tal Tech's and BT 2000's antitrust claims. Tal Tech and BT 2000 assert, for the same reasons such heightened pleading standard was improper for the RICO claims,

it was error for the court to evaluate elements of the antitrust claims under this heightened pleading standard. Aside from the conflict with this Court's rulings in *Swierkiewicz* and *Leatherman*, it conflicts with the rulings of other federal courts which hold that antitrust complaints must be evaluated under the notice pleading standards of Fed.R.Civ.P. 8.

Like the RICO issue, this issue is also, in part, a question of first impression in that this Court has not held that the heightened pleading standards of Rule 9 cannot be applied to antitrust actions.

2) CERTIORARI SHOULD BE GRANTED BECAUSE THE TENTH CIRCUIT HAS DECIDED A MATTER IN DIRECT CONFLICT WITH THE DECISIONS OF THIS COURT AND THE TENTH CIRCUIT'S OWN PRECEDENT.

The Tenth Circuit affirmed the dismissal of Tal Tech's and BT 2000's claims related to the issue of fraudulent condemnation. The court held that dismissal was proper under the *Rooker-Feldman* doctrine based on privity and parallel state litigation. This holding is in direct conflict with this Court's very recent decisions in *Lance v. Dennis,* 126 S.Ct. 1198 (2006) and *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280 (2005). It also directly conflicts with the Tenth Circuit's decision in *Mo's Express v. Sopkin,* 441 F.3d 1229, 1234 (10th Cir. 2006). Certiorari should be granted to allow review and correction of the Tenth Circuit's erroneous application of *Rooker-Feldman.*

3) CERTIORARI SHOULD BE GRANTED BECAUSE THE TENTH CIRCUIT HAS APPLIED *RES JUDICATA* IN A MANNER WHICH DIRECTLY CONFLICT WITH ITS OWN PRECEDENT AND IT INVOLVES A QUESTION OF FIRST IMPRESSION FOR THIS COURT.

The district court dismissed Moshe Tal's personal claims on the grounds of *res judicata.* The court found that Moshe Tal had been the *qui tam* relator in a prior *qui tam* action, Tal III, and that he could and should have brought his personal claims in that action and his failure to do so rendered the judgment in that case *res judicata* as to his personal claims. This holding violates the Tenth Circuit's own case law which holds that a *qui tam* relator's personal claims cannot be

asserted in a *qui tam* and therefore the judgment in the *qui tam* is not *res judicata* as to the relator's claims.

This is an issue not previously addressed by this Court and it is a important issue of federal and state concern as there are *qui tam* relators at both levels and their rights should be clarified. Moshe Tal therefore respectfully asks this Court to grant certiorari to review and rule on this issue.

4) CERTIORARI SHOULD BE GRANTED BECAUSE THE TENTH CIRCUIT HAS APPLIED *RES JUDICATA* IN A MANNER WHICH DIRECTLY CONFLICTS WITH THE DECISIONS OF THIS COURT AND THE TENTH CIRCUIT'S OWN PRECEDENT.

The Tenth Circuit's finding that *res judicata* bars Moshe Tal's claim, directly conflicts with the decisions of this Court and the Tenth Circuit's own precedent. Both courts have held that where there is a significant change of facts and/or law, *res judicata* will not bar a subsequent suit. However, despite significant change in facts and law involving the condemnation, the district court held that Moshe Tal was barred by *res judicata* from asserting his claim for fraudulent condemnation.

The Tenth Circuit's decision's conflicts with the decision of this Court and the Tenth Circuit's own case law. Moshe Tal therefore respectfully asks this Court to grant certiorari to review and rule on this issue.

DISCUSSION

THE TENTH CIRCUIT ERRONEOUSLY APPLIED THE HEIGHTENED PLEADING STANDARD OF FEDERAL RULE OF CIVIL PROCEDURE 9 TO ALL ELEMENTS OF RICO CONTAINED IN THE TALS' COMPLAINT AND THEREBY ERRONEOUSLY AFFIRMED THE JUDGMENT DISMISSING THE TALS' RICO CLAIMS.

Tal Tech and BT 2000 seek certiorari review asking this Court to decide whether a federal court is permitted to use the heightened pleading standard found in Fed.R.Civ.P. 9 to determine the sufficiency of the allegations of all elements of a RICO complaint.

The Tenth Circuit has adopted the heightened pleading requirement of Fed.R.Civ.P. 9(b) for all elements of RICO alleged in a complaint. *Cayman Exploration Corp. v. United Gas Pipeline*, 873 F.2d 1357 (10th Cir. 1989); *Farlow v. Peat, Marwick, Mitchell & Co.*, 956 F.2d 982, 989 (10th Cir. 1992); *Brannon v. Boatmen's Bancshares, Inc.*, 952 F.Supp. 1478 (W.D. OK 1997) *aff'd, Brannon v. Boatmen's First National Bank of Oklahoma*, 153 F.3d 1144 (10th Cir. 1998).

This heightened standard of review directly conflicts with the decisions of this Court holding that in all civil actions, with the exception of allegations of fraud or mistake, the standard of pleading is that provided for in Fed.R.Civ.P. 8(a). Application of a heightened pleading standard, such as that found under Fed.R.Civ.P. 9, is prohibited. This heightened standard of pleading also conflicts with the decisions of other federal courts which hold that in a RICO action, only the claims for the predicate acts of fraud must be plead pursuant to the particularity standard of Rule 9. All other elements of RICO need only be pled pursuant to the notice requirements of Rule 8.

PLEADING UNDER FED.R.CIV.P. 8

Under Fed.R.Civ.P. 8, a complaint must include only "a short and plain statement of the claim showing that the pleader is entitled to relief." *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 512 (2002) *quoting Conley v. Gibson*, 355 U.S. 41, 47 (1957). The complaint's main function is to "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. at 47.

Reaffirming the liberal pleading standard of Rule 8, in *Leatherman v. Tarrant County*, 507 U.S. 163 (1993) this Court quoted *Conley* stating:

> The Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.

Leatherman v. Tarrant County, 507 U.S. at 168 *quoting Conley v. Gibson*, 355 U.S. at 47.

The Federal Rules of Civil Procedure require a plaintiff to disclose adequate information regarding the basis of the claim for relief as distinguished from a bare averment that the plaintiff wants relief and is simply entitled to it. *See 5 Charles Allen Wright & Arthur R. Miller, Federal Practice and Procedure: Civil 2d* § 1202 (2d ed. 1990). A complaint contains adequate information regarding the basis of the claim for relief if it contains even "the bare minimum facts necessary to put the defendant on notice of the claim so that he can file an answer." *Higgs v. Carver*, 286 F.3d 437, 439 (7th Cir. 2002). To provide a defendant with fair notice, "a complaint must allege facts bearing on all material elements necessary to sustain a recovery under some viable legal theory." *Looper Maintenance Service, Inc. v. City of Indianapolis*, 197 F.3d 908, 911 (7th Cir. 1999) (citation omitted).

The pleading rules of Rule 8 apply to all civil actions unless specifically stated otherwise. One example is under Fed.R.Civ.P. 9, which requires that claims of fraud and mistake be pled with particularity. However, the particularity standard does not apply to civil causes of action unless such claims are listed under Fed.R.Civ.P. 9. *Leatherman v. Tarrant County,* 507 U.S. at 168.

Based upon the liberal pleading standard established by Fed. R. Civ. P. 8(a), even the failure to cite a statute, or to cite the correct statute, will not affect the merits of the claim. *Northrop v. Hoffman of Simsbury, Inc.*, 134 F.3d 41, 46 (2d Cir. 1997). In considering a motion to dismiss, it is not the legal theory but, rather, the factual allegations that matter. *Id.*

DISMISSAL FOR FAILURE TO STATE A CAUSE OF ACTION UNDER FED.R.CIV.P. 12(B)(6).

When reviewing a motion to dismiss, all factual allegations made in a complaint must be taken as true. *United States v. Gaubert*, 499 U.S. 315, 327 (1991). When evaluating a complaint for failure to state a claim, the question is not whether the facts stated in the complaint, if proven, would entitle the plaintiff to any relief. Instead, the question is whether there is any set of "facts that could be proved consistent

with the allegations of the complaint" which would entitle the plaintiff to some relief. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984). To avoid a motion to dismiss, a complaint needs only to set out facts sufficient to 'outline or adumbrate' the basis of the claim. *Panaras v. Liquid Carbonic Industries Corp.*, 74 F.3d 786, 792 (7th Cir. 1996).

The Court's analysis under Rule 12(b)(6) requires it to determine whether the facts alleged in the complaint would entitle the plaintiff to a legal remedy. In appraising the sufficiency of the complaint a court must follow the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

RULE 8(A) GOVERNS THE PLEADING OF CAUSES OF ACTION UNDER RICO.

With the exception of the Tenth Circuit, the federal courts generally agree that with the exception of elements of fraud, all other allegations of RICO violations are subject to the pleading requirements of Rule 8(a). Whereas allegations of fraudulent acts must pleaded with Fed.R.Civ.P. 9(b) particularity in RICO cases, allegations as to the existence of an enterprise need only meet the notice-pleading standards of Rule 8. *See Haroco, Inc. v. American National Bank & Trust of Chicago*, 747 F.2d 384, 404-05 (7th Cir. 1984), aff'd on other grounds, 473 U.S. 606, 87 L. Ed. 2d 437, 105 S. Ct. 3291 (1985); *see also Otto v. Variable Annuity Life Insurance*, 814 F.2d 1127, 1136 (7th Cir. 1986); *United States v. Neapolitan*, 791 F.2d 489, 499-500 (7th Cir. 1986).

For purposes of 18 U.S.C. § 1962(a)(b) and © the standard of pleading is set under the liberal pleading requirements of Fed.R.Civ.P. 8(a)(2). *Westways World Travel v. AMR Corp.*, 182 F.Supp.2d 952, 955(C.D. Cal. 2001). Only when a party is pleading fraud, is the party required to state the facts with specificity. *Westways World Travel v. AMR Corp.*, 182 F.Supp.2d at 957.

Where a predicate act for purposes of RICO does not sound in fraud, a RICO claimant need only comply with the general pleading

requirements of Rule 8 (e)(1) and not the heightened pleading requirements of Rule 9(b). *Williams v. Mohawk Indus.*, 314 F.Supp.2d 133, 1344 (D.Ga. 2004); *Richmond, v. Nationwide Cassel L.P.*, 52 F.3d 640 (7th Cir. 1995); *Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 26 (2nd Cir. 1990).[6]

THIS COURT HAS HELD THAT HEIGHTENED PLEADING RULES UNDER FED.R.CIV.P. 9 CANNOT BE APPLIED TO CIVIL CASES OTHER THAN THOSE ALLEGING FRAUD OR MISTAKE.

In recent years it has been brought to this Court's attention that heightened rules of pleading, beyond that required by Rule 8, were being applied in various types of civil cases. *Leatherman v. Tarrant County*, 507 U.S. 163 (1993); *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506 (2002).

In *Leatherman v. Tarrant County*, this Court rejected the Fifth Circuit's application of a heightened pleading standard in cases alleging municipal liability under Section 1983. The Court made it quite clear that application of a standard of pleading other than the liberal notice pleading requirements of Fed.R.Civ.P. 8 was forbidden in civil cases unless otherwise provided by the Fed.R.Civ.P. or other statute. Thus, only in cases of fraud and mistake could a court apply the particularity requirement imposed in Fed.R.Civ.P. 9. Therefore, since a § 1983 case against a municipality is not one for fraud or mistake, the pleading requirements of Rule 8 and not those of Rule 9, must be applied in evaluating the sufficiency of the complaint.

Another instance of unauthorized heightened pleading requirements was presented to, and rejected by, this Court in *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506 (2002). In *Swierkiewicz*

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[6] Under substantially similar facts as the present case, the Eastern District of Illinois held that the plaintiffs had adequately plead a RICO violation and dismissal for failure to state a claim was improper. In *Pelfresne v. Stephens et al.*, 35 F.Supp2d 1964 (E.D. Ill. 1999) the allegations were remarkably similar to those in the present case, including alleged bribery, sham condemnation proceedings, use of condemned property for improper purposes, and award of contracts to favored developer. In *Pelfresne*, the court held that, despite alleged insufficient pleading of RICO claims, plaintiff's RICO claims could not be dismissed under Rule 12(b)(6).

this Court again held that was a violation of the Rules of Civil Procedure to apply a heightened pleading requirement to an action where such requirement is not imposed by Rule of statute. Thus, in *Swierkiewicz,* this Court held that it was error to grant a motion to dismiss a complaint alleging discrimination on the grounds that the claims were not plead with the particularity required by Rule 9. *Swierkiewicz v. Sorema, N.A.*, 534 U.S. at 514.

DISMISSAL OF THE RICO CLAIMS BASED ON THE HEIGHTENED STANDARD OF PLEADING UNDER RULE 9 IS IN DIRECT CONFLICT WITH THE FEDERAL RULES OF CIVIL PROCEDURE, THE DECISIONS OF THIS COURT AND THE DECISIONS OF OTHER FEDERAL COURT.

With the exception of allegations of fraudulent predicate acts, all elements of a RICO claim must be plead under the notice pleading standards of Rule 8. Thus, the Tenth Circuit erred when it used the heightened standard of pleading under Rule 9 to determine the sufficiency of all the elements of the Tals' RICO claim, including the allegations of bribery. Using this improper standard, the Tenth Circuit erroneously affirmed the dismissal of the Tals' RICO claims because the Tals' did not cite the relevant bribery statute in the Complaint, and because the Complaint allegedly only made conclusory allegations of bribery. Because of the alleged failure to adequately plead bribery, the Tenth Circuit dismissed the Tals' entire RICO action.

After holding that the Tals' had adequately plead the predicate acts of mail and wire fraud and a pattern of racketeering, the Tenth Circuit held that the RICO action must be dismissed because it failed to adequately plead bribery. The court held that without any claims of bribery, the Tals' could not support their claims of control or participation in the enterprise as required by § 1962(b) and § 1962©. Thus, the failure to satisfy the elements of §§ 1962(b)© required the dismissal of the Tals' entire RICO action.

The allegations of bribery contained in the complaint were more than sufficient to satisfy the notice pleading requirements of Rule 8. Tal Tech and BT 2000 cited numerous acts of bribery, and supported each allegation with the names and positions of the parties, the nature,

type, and where applicable, the value of the bribe, and the purpose and effect of the bribe. Moreover since Rule 8 does not require that a plaintiff cite the statute relied upon for relief, it was not error for the Tals' not to cite the bribery statute in their Complaint.

Certiorari should be granted in this matter to review the Tenth Circuit's use of an unjustified, heightened standard of pleading for all elements of a RICO claim. The Tenth Circuit's use of this standard is manifestly incorrect in light of the Federal Rules of Civil Procedure, the decisions of this Court and the decisions of other lower federal courts.

HEIGHTENED STANDARD OF PLEADING ALSO VIOLATES RULES FOR PLEADING ANTITRUST VIOLATIONS AND IMMUNITY

The Tenth Circuit's application of a heightened standard of pleading to hold that Tal Tech and BT 2000 failed to adequately plead bribery, also resulted in the dismissal of their antitrust claims. The dismissal was based on findings of Parker and Noerr-Pennington immunity protected the defendants and failure to adequately plead an antitrust violation.

The Tenth Circuit held that because the Tals' failed to adequately plead bribery, there was no waiver of immunity by Douglas or the Hogans, and without the bribery claim, the evidence was, in part, insufficient to prove an antitrust violation. See Opinion, 453 F.3d at 1259 (holding that Douglas was entitled to immunity because there was no evidence of illegality of her actions); Opinion, 453 F.3d at 1269, 1267 n27 (listing several of the allegations of bribery and holding them insufficient to show bribery) and Opinion, 453 F.3d at 1261 ("nor was there any evidence of bribery" for purposes of finding an antitrust violation). Thus, the use of the heightened pleading requirement for bribery to support the RICO claim has infected the pleading requirements for antitrust. There is no heightened pleading requirement for antitrust. *Twombly v. Bell Atlantic Corporation*, 425 F.3d 99, 104 (2nd Cir. 2005), U.S. Supreme Court certiorari granted by *Bell Atl. Corp. v. Twombly*, 126 S. Ct. 2965, 165 L. Ed. 2d 949 (U.S., June 26, 2006)(while Tal Tech and BT 2000 do not have access to the petition for certiorari filed by *Bell Atlantic Corp.* they believe it reasonable to assume that at least one of the issues posed for certiorari

review is whether a heightened pleading standard applies to antitrust actions. If that is true, it is further support for granting certiorari in this case to review the propriety of heightened pleading requirements for RICO actions).

Just as it was with RICO, the Tenth Circuit's application of the heightened pleading requirement to antitrust actions directly conflicts with *Swierkiewicz v. Sorema*, N.A., 534 U.S. 506 and *Leatherman v. Tarrant County*, 507 U.S. 163 as well as the decisions of other federal district courts. Because the improper heightened pleading requirement for the bribery claim has also resulted in the unjustifiable dismissal of Tal Tech's and BT 2000's antitrust claims, Tal Tech and BT 2000 respectfully ask this Court to grant certiorari and hold that the application of the heightened pleading requirements do not apply to antitrust claims.

MISAPPLICATION OF THE *ROOKER-FELDMAN* DOCTRINE.

The Tenth Circuit Court of Appeals held that the *Rooker-Feldman* Doctrine bars Tal Tech from asserting a claim for fraudulent condemnation as an independent action and Tal Tech and Petitioner BT 2000 from using the fraudulent condemnation as a predicate for their RICO claims. The Tenth Circuit's application of *Rooker-Feldman* in this case directly conflicts with this Court's decisions in *Lance v. Dennis,* 126 S.Ct. 1198 (2006) and *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280 (2005). It also violates the Tenth Circuit's own precedent in *Mo's Express v. Sopkin,* 441 F.3d 1229, 1234 (10th Cir. 2006).

ROOKER-FELDMAN DOCTRINE DOES NOT BAR ACTIONS BASED ON PRIVITY NOR PARALLEL ACTIONS IN STATE AND FEDERAL COURT.

The *Rooker-Feldman* doctrine is a narrow rule of very limited application. Under the *Rooker-Feldman* doctrine, "lower federal courts are precluded from exercising appellate jurisdiction over final state-court judgments." *Lance v. Dennis,* 126 S.Ct. at 1201. The doctrine applies only in where a party, in effect, seeks to appeal an unfavorable state-court decision to a lower federal court. *Exxon Mobil*

Corp. v. Saudi Basic Industries Corp., 544 U.S. at 291. It only applies where the party has brought the federal case to directly attack the state court judgment. *Rooker-Feldman* is not a substitute for ordinary principles of preclusion or an extension of other grounds for federal court abstention. *Mo's Express v. Sopkin,* 441 F.3d 1229, 1234 (10th Cir. 2006)(*citing Exxon Mobil, supra*).

The *Rooker-Feldman* doctrine does not bar actions by non-parties to the earlier state-court judgment nor does it apply to persons who were not parties but could be found to be in privity with a party for purposes of preclusion law. *Lance v. Dennis,* 126 S.Ct. at 1202; *Mo's Express v. Sopkin,* 441 F.3d at 1234-35. Nor does it apply to parallel state and federal litigation. *Lance v. Dennis,* 126 S.Ct. at 1201 (*citing Exxon v. Mobil,* 544 U.S. at 292).

ROOKER-FELDMAN WAS MISAPPLIED TO BAR TAL TECH AND BT 2000 FROM BRINGING CLAIMS BASED ON THE FRAUDULENT CONDEMNATION.

Rooker-Feldman was plainly misapplied by the Tenth Circuit to preclude Tal Tech's action for condemnation obtained by fraud and to preclude Tal Tech and BT 2000 from asserting the fraudulent condemnation as a predicate act for purposes of RICO. The court first erred in using the concept of privity to bar the Tals from raising claims of fraudulent condemnation. It erred again when it held that an action which is still pending in state court bars parallel litigation in federal court.

ERROR IN FINDING BAR BASED ON PRIVITY.

The action in *City of Okla. City v. Okla. City Urban Renewal Auth.*, 1999 OK 71, 988 P.2d 901 (*"Tal I"*), relied upon by the court as a bar to the Tals' condemnation claims, was an action to which neither Tal Tech nor BT 2000 was a party and in which neither the issue of fraud or the condemnation was litigated. The Tenth Circuit held that the judgment in *Tal I* shows that the issue of fraud related to the condemnation was litigated in that action and that Tal Tech and BT 2000 are precluded by that judgment from asserting a claim for fraudulent condemnation as a claim, or as a predicate, for RICO in the present case. The court is mistaken.

Tal I was a *qui tam* action brought by the City of Oklahoma City against the Urban Renewal and two of the Hogans[7], in response to a taxpayer demand made pursuant to Oklahoma *qui tam* statutes.[8] There were no other parties to the action. Thus, to find that Tal Tech and BT 2000 were barred from asserting a claim for fraudulent condemnation, the Tenth Circuit relied on its holding in *Kenman Eng'g v. City of Union*, 314 F.3d 468 and held that because there was privity between Tal Tech, BT 2000, and the City, Tal Tech and BT 2000 were barred by *Rooker-Feldman* from asserting any claims which were raised or could have been raised in *Tal I*.[9]

This was plain error in light of this Court's recent decision in *Lance v. Dennis*, overruling *Kenman* and holding that the Tenth Circuit erred when it relied upon *Kenman* to hold that privity between

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[7] Bricktown TMK/Hogan Entertainment, L.L.C., and Bricktown Parking Investors, L.L.C., - Respondents/Appellants Nos. 4 and 5 here.

[8] The *Tal I* suit was a "friendly" *qui tam* related Declaratory Judgment suit, whereby, all parties were in agreement with the relief sought. This is not the first time that the City attempted to prevent taxpayers from filing *qui tam* suits and misuse the Declaratory Judgment, without naming or allowing taxpayers' intervention. In another recent *qui tam* ruling of the Oklahoma Supreme Court, the court referred to the City's and Urban Renewal's filing a friendly Declaratory judgment against themselves and stated: ... "The obvious function in filing the declaratory judgment suit was to divert the filing of a *qui tam* suit by reaching the same issues which would have been decided, had a *qui tam* suit become necessary." *Oklahoma City Urban Renewal Authority v. the City of Oklahoma City, et al.*, 110 P.3d 550 (Okla. 2005), at 559. Unfortunately, as noted by the Oklahoma Supreme Court in *Tal IV* the actual effect of the *Tal I* was to avoid the more controversial and difficult issues raised by the taxpayers and to preclude those issues from ever being litigated.

[9] Moshe Tal is a known Oklahoma City public advocate. He was the leader and founder of the *Taxpayers Against Ripoffs taxpayers'* citizens group (now incorporated under the name: *Taxpayers for Honest Government, Inc.*- a non-profit corporate entity - Tal is its President). Tal is also the president of the two businesses and corporate Petitioners- Tal Tech and BT-2000. Certainly, it stretches the concept of privity to hold that Tal Tech and BT 2000 are in "privity" with the City and/or Urban Renewal, just because Tal was president of these corporations, especially when Tal, as leader of T.A.R. (not as president of Tal tech or BT-2000), was not allowed to intervene in the friendly Declaratory Judgment suit.

parties and non-parties barred the non-parties' litigation of the same or related claims under *Rooker-Feldman*. In *Lance v. Dennis*, 126 S.Ct. 1198, this Court specifically held that the *Rooker-Feldman* doctrine does not bar actions by non-parties to an earlier state court judgment based on privity that might bar a claim for purposes of preclusion law. Thus, while it is true for purposes of preclusion law, that the *qui tam* action might preclude Tal Tech and BT 2000, as citizens, from relitigating issues that were or could have been raised in the state court *qui tam* action, they are not precluded by *Rooker-Feldman* from asserting a claim for fraudulent condemnation in federal court.

Furthermore, the decisions in *Tal I* and *Tal IV* make it clear that neither fraud nor the condemnation were issues before the court. The only issue raised by the City in *Tal I* was the lawfulness of three redevelopment contract(s). *Tal IV*, 2007 ¶ 6, 61 P.3d 234, 240. The City did not raise any issues of fraud or condemnation in the trial court and neither the City, Urban Renewal nor the Hogans, sought review of the trial court's decision. *Tal IV*, 2003 OK 97 ¶ 8, 61 P.3d at 241. The appeal in *Tal I* arose out of the failed attempt of Moshe Tal and Taxpayer Against Ripoffs ("TAR"), as *qui tam* relators, to intervene in the state trial court action between the City and Urban Renewal. *Tal IV*, 2003 OK 97 ¶¶ 7, 8, 61 P.3d at 241. In *Tal I*, Moshe Tal and TAR attempted to intervene to assert, among other claims, fraud on the part of the City, Urban Renewal and others in the making of the redevelopment contract(s), and misappropriation of tax funds. *Tal IV*, 2003 OK 97 ¶ 7, 61 P.3d at 241. The trial court denied the motion to intervene. Moshe Tal and TAR appealed the denial of their motion to intervene. *Tal IV*, 2003 OK 97 ¶ 8, 61 P.3d at 241. Intervention was the ***only*** issue on appeal since Moshe Tal and TAR were never parties to the litigation and therefore could not appeal the judgment of the district court as to any other issues. *Tal IV*, 2003 OK 97 ¶ 9, 61 P.3d at 241. *Tal I* even expressly stated that only the narrow issue of whether the trial court erred in denying taxpayers' motion to intervene (and a related motion for a continuance) was before the court. *Tal I*, 1999 OK 71, at ¶ 14, 988 P.2d 901, 905; *Tal IV*, 2002 OK 97 ¶ 9,61 P.2d at 241. Thus, any statements by the Oklahoma Supreme Court relating to fraud are merely *dicta*, since the issue of fraud was not before it. Therefore, the Tenth Circuit's reliance on the Oklahoma Court's alleged finding that there was no fraud in regards to the

condemnation, has no basis in fact.

ERROR IN FINDING PRECLUSION WHERE THE STATE ACTION IS STILL PENDING.

In regard to the condemnation action, the Tenth Circuit held that even though the condemnation action on Tal Tech's property is still pending in state court, *Rooker-Feldman* precludes Tal Tech or BT 2000 from asserting a claim in federal court asserting that the condemnation was fraudulent. To reach this conclusion, the Tenth Circuit again relied on *Kenman Eng'g,* 314 F.3d at 474 to hold that *Rooker-Feldman* precludes a federal action arising out of a condemnation even though the state condemnation proceeding is not yet final. This holding is in direct conflict with this Court's decision in *Exxon Mobil,* 544 U.S. at 292. In *Exxon*, this Court held that *Rooker-Feldman* does not bar parallel state and federal litigation. *Exxon Mobil,* 544 U.S. at 292.

The state condemnation action is still pending.[10] There has never been a trial on the amount of compensation in the condemnation. While there was an interlocutory appeal of the judgment holding that the condemnation was for a proper public purpose, Tal Tech has filed a petition in that action to vacate the judgment on the grounds of fraud in obtaining that judgment.[11]

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[10] *See* OSCN's Case Docket Reports (www.oscn.net) for the following two (2) cases: *City of Oklahoma City v. Tal technologies Inc.*, CJ-97-2034 (the initial condemnation suit); and *Tal, et al., v. Hogan, et al.,* CJ-04-7943 (the Tals' petition to vacate the condemnation judgment obtained by fraud, and the tortious interference with business claims - the 'state claims" which were dismissed without prejudice by the District Court. This latest suit was filed within one year from the time the District Court issued it Judgment).

[11] The Tenth Circuit also found that the based upon *Kelo v. City of New London*, 125 S.Ct. 2655, 2665-66 (2005), the finding that condemnation purportedly undertaken for public use but then transferred to another entity for private sue, was not a constitutional violation which constituted fraud. However, this holding is incorrect and actually conflicts with *Kelo*. In *Kelo*, this Court held that whether a state may condemn private property for private use, depended upon state law. Since *Kelo*, and the filing of the condemnation action against Tal Tech's property, the Oklahoma Supreme Court held in *The Board of Commissioners of Muskogee County v. Lowery*, 2006 OK 31, 136 P.3d 639, that

CERTIORARI REVIEW IS REQUIRED TO CORRECT THE TENTH CIRCUIT'S CONTINUED MISAPPLICATION OF THE *ROOKER-FELDMAN* DOCTRINE.

Despite this Court's holdings to the contrary in recent decisions which hold that privity and parallel state court proceedings do not bar federal litigation under *Rooker-Feldman*, and despite the fact that these cases directly overrule the case relied upon by the Tenth Circuit, the Tenth Circuit has held that under *Rooker-Feldman* – privity bars Tal Tech and BT 2000 from asserting claims based on fraudulent condemnation and that a pending state court action also bars fraudulent condemnation claims. The Tenth Circuit's continued disregard of this Court's pronouncements on the applicability of the *Rooker-Feldman* doctrine, calls for this Court to grant certiorari and assume jurisdiction to correct the Tenth Circuit's continued misapplication of the *Rooker-Feldman* doctrine.

MISAPPLICATION OF *RES JUDICATA*

1) THE ISSUE OF WHETHER A *QUI TAM* RELATOR'S PERSONAL CAUSES OF ACTION ARE BARRED BY A PRIOR *QUI TAM* IS A QUESTION THAT HAS NOT PREVIOUSLY BEEN DECIDED BY THIS COURT.

The district court held that Moshe Tal was barred by *res judicata* from asserting claims for fraudulent condemnation because he was the *qui tam* "relator" in the *qui tam* action known as Tal III.[12] *See*,

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the Oklahoma Constitution prohibits the condemnation of private property for private use. The Oklahoma Supreme Court also held in *Midwest City v. House of Realty, Inc., et al.*, 2004 OK 56, 100 P.3d 678 and related case - *House of Realty, Inc., v. City of Midwest City*,2004 OK 97, 109 P.3d 314, that a government entity may not condemn private property for one purpose and then transfer it to another governmental entity for another purpose. The holdings in both of these cases are precisely what Tal Tech, BT 2000, and Moshe Tal have asserted and continue to assert in claiming that the condemnation of Tal Tech's property was constitutionally impermissible and constituted fraud.

[12]In its Opinion, the Tenth Circuit did not address the *res judicata* issues against Moshe Tal even though the issues were well-briefed in his Opening Brief and the Joint Petition for Rehearing. However, by not addressing the

10/30/02 Transcript, Appendix 81-101; Tals'3/12/03 Response to motions to Dismiss, Appendix, pp. 315-352.. According to the district court, Moshe Tal had his opportunity to assert his private cause of action in the *qui tam*, and because he failed to do so, *res judicata* now bars him from asserting that claim.

A *QUI TAM* RELATOR BRINGS THE ACTION ON THE PART OF THE GOVERNMENT AND CANNOT ASSERT PERSONAL CLAIMS IN THE SUIT, THEREFORE *RES JUDICATA* DOES NOT APPLY TO THE RELATOR'S PERSONAL CLAIMS.

In a taxpayers' suit (*Qui Tam*), the Relator (a/k/a the "whistleblower"), brings the action to recover money or property belonging to the government which was obtained fraudulently. Under the False Claims Act, a private party, called a relator, is permitted to bring an action in the name of the Government against anyone who submits to it a false claim. *Freedman v. Rite Aid Corp.*, 152 F. Supp. 2d 766 (E.D.PA, 2001)

"Although *qui tam* actions allow individual citizens to initiate enforcement against wrongdoers who cause injury to the public at large, the Government remains the real party in interest in any such action." *Minotti* v. *Lensink*, 895 F.2d 100, 104 (2d Cir. 1990). The "United States is the real party in interest in any False Claims Act suit, even where it permits a *qui tam* relator to pursue the action on its behalf." *United States ex rel. Milam* v. *University of Texas*, 961 F .2d 46, 50 (4th Cir. 1992)

Because a realtor is bringing the action in a representative capacity, relator is acting in the public interest and is not at liberty and has no standing to enforce private rights, hence private causes of action may not be brought in a taxpayer suit. *Satsky v. Paramount Communications, Inc.*, 7 F.3d 1464, 1469 (10th Cir. 1993). Therefore, suits on behalf of a public entity will not operate as *res judicata* against private rights of action: "to the extent these claims involve injuries to purely private interests, which the State cannot raise, then

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district court's decision, the Tenth Circuit has, in effect, affirmed the district court judgment on the issue of *res judicata* against Moshe Tal.

the claims are not barred [by *res judicata*]. By "purely private interests," we mean claims that the State has no standing to raise." *Satsky, supra*, at 1470.

BECAUSE MOSHE TAL WAS A RELATOR, HE COULD NOT ASSERT HIS PERSONAL CLAIMS IN *THE QUI TAM* AND THE JUDGMENT IN THE *QUI TAMS* IS NOT *RES JUDICATA* AS TO HIS PERSONAL CLAIMS.

Moshe Tal's involvement in the *qui tams* was as the *qui tam* relator representing the government's interest, not his own. As a relator, he was not a party and was not allowed to join or litigate his private claims in the *qui tam*. Because he was not a party and not able to assert his private interests, then his personal claims are not barred by *res judicata*.

The Tenth Circuit's affirmance of the district court's dismissal of Moshe Tal's personal claims related to the fraudulent condemnation on *res judicata* grounds, violates Tenth Circuit precedent and presents a question of first impression for this Court. Moshe Tal thereby respectfully asks this Court to grant certiorari to review and render an opinion on this issue.

2) THE HOLDING THAT MOSHE TAL'S CLAIMS ARE BARRED DESPITE THE OCCURRENCE OF NEW FACTS AND LAW, APPLIES *RES JUDICATA* IN A MANNER WHICH DIRECTLY CONFLICTS WITH THE DECISIONS OF THIS COURT AND THE TENTH CIRCUIT'S OWN PRECEDENT

The Tenth Circuit affirmed, by not deciding, the district court's dismissal of Moshe Tal's fraudulent condemnation claims on the grounds of *res judicata*. However, finding that *res judicata* bars Moshe Tal's claim, directly conflicts with the decisions of this Court and the Tenth Circuit's own precedent.[13] Both courts have held that where there is a significant change of facts and/or law, *res judicata* will not bar a subsequent suit. However, despite significant change in

[13]Moshe Tal has standing to bring the condemnation claims because the property was transferred to him by Tal Tech as payment on promissory note.

facts and law involving the condemnation of Tal Tech's property, the district court held that Tal was barred by *res judicata* from asserting his claim for fraudulent condemnation

***RES JUDICATA* AND COLLATERAL ESTOPPEL DO NOT BAR RELITIGATION WHERE THERE HAS BEEN A SIGNIFICANT CHANGE IN FACTS AND/OR LAW SINCE THE JUDGMENT IN THE INITIAL ACTION**

It has long been held that collateral estoppel and *res judicata* do not bar a suit where there has been a significant change in underlying law or facts since the bringing of a prior suit on the same course of wrongful conduct. *Lawlor v. Nat' Screen Serv. Crop.*, 349 U.S. 322, 327-28 (1955); *see also Restatement § 24 cmt. f* ("Material operative facts occurring after the decision of an action with respect to the same subject matter may in themselves, or taken in conjunction with the antecedent facts, comprise a transaction which may be made the basis of a second action not precluded by the first.").

In *Spradling v. City of Tulsa,* 198 F.3d 1219 (10th Cir. 2000) the Tenth Circuit held:

> The doctrines of collateral estoppel and res judicata, however, apply only in cases where controlling facts and law remain unchanged. [citation omitted] Consequently, res judicata and collateral estoppel are inapplicable where, between the first and second suits, an intervening change in the law or modification of significant facts create new legal conditions. *Id.* The Supreme Court decision in *Auer* constitutes an intervening change in the law sufficient to render collateral estoppel and res judicata inapplicable to the present case. *See, e.g., Community Hospital v. Sullivan,* 986 F.2d 357, 360 (10th Cir. 1993) (refusing to apply collateral estoppel following change in facts and law).

Spradling, at 1223.

THE SIGNIFICANT CHANGE IN FACTS AND LAW SINCE THE INITIAL CONDEMNATION JUDGMENT MANDATES THAT *RES JUDICATA* DOES NOT BAR MOSHE TAL'S CLAIMS FOR FRAUDULENT CONDEMNATION.

In the present case, there was a significant change in the facts regarding the fraudulent condemnation. The City and Urban Renewal have maintained from the beginning that condemnation was for public use. The Tals maintained that the City and Urban Renewal planned to use it for private development. However, because Tal had no proof that condemned property would be used for private use, he could not support a claim for fraudulent condemnation. However, now that a portion of the condemned property has been transferred to a private individual, and actually developed for private use, Tal can support his claim for fraudulent condemnation and *res* judicata is no bar.

The law has also changed significantly since the *qui tam* judgments were entered. Tal's claim for fraudulent condemnation is based, in part on the claim that private property cannot be taken for private use nor can one governmental entity condemn property and then transfer it to another governmental entity for another use. At the time of the *qui tam* and judgment, there was no Oklahoma authority on these two issues. However, since the *qui tam* judgment was entered, the Oklahoma Supreme Court has decided three cases which support Tal's claims. *See The Board of Commissioners of Muskogee County v. Lowery*, 2006 OK 31, 136 P.3d 639 (private property cannot be taken for private use); *Midwest City v. House of Realty, Inc., et al.*, 2004 OK 56, 100 P.3d 678 and related case - *House of Realty, Inc., v. City of Midwest City,*2004 OK 97, 109 P.3d 314 (one governmental entity cannot condemn private property and then transfer it to another governmental entity for another use).

The jurisprudence of this Court and its progeny hold that *res judicata* cannot be used to bar causes of action where there has been a significant change in facts or law affecting the case. The Tenth Circuit decision here directly conflicts with this Court's pronouncements. Thus, because both the operative facts and the law have changed significantly since the *qui tam* judgment was filed, the Tenth Circuit's decision upholding the district court's dismissal of Moshe Tal's claims for fraudulent condemnation, based on *res*

judicata should be reversed.

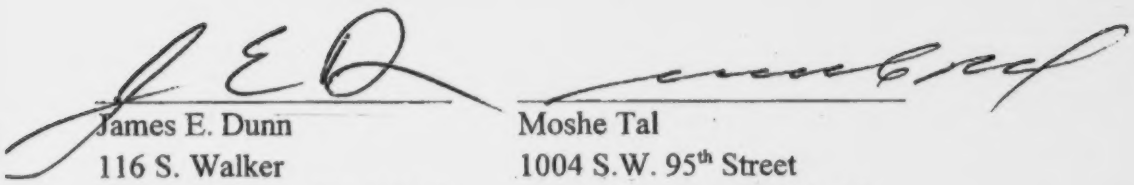
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